No. 15681

United States Court of Appeals

For the Ninth Circuit

UNITED STATES FIDELITY & GUARANTY COMPANY, a corporation, *Appellant,*

vs.

ANDERSON CONSTRUCTION CO., INC., a corporation, *Appellee.*

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANT

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INDEX

TABLE OF AUTHORITIES

Cases

Cases

Texts

Statutes

Statutes

United States Court of Appeals
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BRIEF OF APPELLANT

JURISDICTION

This civil action at law was commenced by complaint filed in the U. S. District Court at Seattle by the Appellant United States Fidelity & Guaranty Co. against the Appellee Anderson Construction Co., Inc. The complaint alleged that the Appellant was a Maryland corporation and the Appellee was a Washington corporation, and that the amount in controversy was in excess of $3,000.00, exclusive of interest and costs. (R. 3) The Appellee's answer admitted these jurisdictional allegations. (R. 18)

The jurisdiction of the U. S. District Court for the Western District of Washington, Northern Division is based upon USC Title 28, Section 1332.

The jury's verdict for the Appellee was filed the 17th of May 1957. (R. 83) Judgment being entered thereon,

the Appellant's motion for judgment notwithstanding the verdict, or in the alternative, for order granting new trial, was filed the 25th of May 1957. (R. 85) Order denying Appellant's said motion was filed the 17th of June 1957. (R. 87) Appellant's notice of appeal was filed the 16th of July 1957. (R. 88)

The jurisdiction of the U. S. Court of Appeals for the Ninth Circuit is based upon USC Title 28, Section 1291.

STATEMENT OF THE CASE

The Appellant was a corporate surety authorized to conduct a bonding business in the State of Washington. Its general agent at Seattle was McCollister & Co., Inc.

The Appellee was engaged in business as a contractor and was associated with two other corporate contractors in a joint venture on a large construction job for the United States.

By this action the Appellant sought to recover the unpaid balance of its premium for performance and payment bonds executed for the Appellee as principal by the Appellant as surety in favor of the United States as obligee.

Appellant's complaint alleged that the Appellee signed a written application dated the 3rd of June, 1955 (attached as Ex. A) for such bonds containing Appellee's joint and several promise to pay premium therefor in the specified sum of $47,753.72; that such bonds (attached as Ex. B and Ex. C) had been accepted by the United States; that premium payments had

been made aggregating the sum of $23,876.86; and that the Appellee had refused to pay the delinquent balance in the sum of $23,876.86 which was still owing. (R. 3-18)

Appellee's answer, after admitting said partial payments, alleged affirmatively that when such application was signed it remained blank as to the amount of premium which was left unspecified, the agent for Appellant then representing that its present premium rates would be reduced in the near future and that Appellee would be given the benefit of the reduction; that Appellant's premium rates were reduced; and that at such rates the agreed total premium amounted to the lesser sum of $35,576.79.

Appellee's answer, in addition, alleged tender to Appellant of two checks in the total sum of $11,699.93, claiming such amount to be the total balance owing on the full premium chargeable by Appellant under the oral agreement for reduction. (R. 18-21)

Appellant's reply, filed in lieu of amended complaint under order of court (R. 28), denied making any oral agreement whereby lesser premium at future reduced rates would be charged to and accepted from the Appellee.

Appellant's reply alleged that the two checks tendered by Appellee were rejected because the amounts payable thereon were calculated upon the basis of reduced premium rates not applicable to the bonds which became effective when accepted by the United States, before or on the 17th of June 1955.

Appellant's reply also alleged that in receiving the Appellee's said application and in executing said bonds,

Appellant was subject to the Insurance Code of the State of Washington (Washington Session Laws 1947, Chapter 79 as amended); that as directed thereby Appellant had caused to be filed with and approved by the Insurance Commissioner its premium rates which became effective on the 30th of April 1951 and continued effective until the 20th of July 1955—the same being operative as to said application and said bonds, and being binding upon both the Appellant and the Appellee; and that computed according to said rates the correct premium chargeable by the Appellant and payable by the Appellee was $47,753.72.

Appellant's reply (quoting verbatim) finally alleged that said Insurance Code contained mandates and prohibitions requiring the Appellant to charge and the Appellee to pay as the legal premium only the amount fixed by the applicable rates as filed and approved. (R. 28-33)

From this summary of the issues, it is obvious that to the Appellant's cause of action the Appellee's sole defense is an unlawful oral agreement for a reduced premium in violation of an express statute.

By the verdict (R. 83) the jury found the oral agreement had been made.

Before this court as in the trial court, the Appellant contends:

1. That being declared illegal by the Insurance Code of the State of Washington, the oral agreement for reduced premium was void as a matter of law.

2. That on all the evidence Appellant's agent had

neither express nor implied authority to bind it upon an unlawful oral agreement made in violation of positive statutory prohibition.

3. That the admissions in the pretrial order and the evidence established an "account stated" upon which Appellant was entitled to recover.

SPECIFICATION OF ERRORS

1. The District Court committed error (to which Appellant excepted) by refusing to give Appellant's requested instruction as follows:

> "You are instructed to return a verdict in favor of the plaintiff and against the defendant in the amount prayed." (R. 80, 352)

2. The District Court erred by its order denying Appellant's motion for judgment notwithstanding the verdict or for new trial because of its refusal to give Appellant's requested instruction as follows:

> "You are instructed to return a verdict in favor of the plaintiff and against the defendant in the amount prayed." (R. 80, 84, 86)

3. The District Court erred by its order over-ruling Appellant's objection to Appellee's requests for admissions, as irrelevant because tending merely to support its sole affirmative defense based on a void oral agreement for an illegal reduction of Appellant's premium. (R. 39, 48, 49)

4. The District Court committed error, to which Appellant excepted, because of instruction given to the jury as follows:

> "I instruct you that there is nothing in the Insurance Code of the State of Washington which

would render void a special contract for the extension of new rates to an earlier contract, if you find such contract was made." (R. 345, 353)

5. The District Court committed error, to which Appellant excepted, because of instruction given to the jury as follows:

"If, however, you are convinced that Mr. Beeson promised and agreed that if the bond rates were reduced as contemplated he would see to it that defendant got the benefit of such reduction without reference to the effective date of the bonds in question, then your verdict should be for the defendant." (R. 346, 353)

6. The District Court erred by its order denying Appellant's motion for judgment notwithstanding the verdict or for new trial because of instruction (to which Appellant excepted), given to the jury as follows:

"I instruct you that there is nothing in the Insurance Code of the State of Washington which would render void a special contract for the extension of new rates to an earlier contract, if you find such contract was made." (R. 345, 353, 84, 86)

7. The District Court erred by its order denying Appellant's motion for judgment notwithstanding verdict or for new trial because of instruction (to which Appellant excepted), given to the jury as follows:

"If, however, you are convinced that Mr. Beeson promised and agreed that if the bond rates were reduced as contemplated he would see to it that defendant got the benefit of such reduction without reference to the effective date of the bonds in question, then your verdict should be for the defendant." (R. 346, 353, 84, 86)

8. The District Court erred by its order denying Appellant's motion for judgment notwithstanding the verdict or for new trial upon the ground

> "That no evidence before the jury tended to show that either J. C. Beeson or McCollister & Company, Inc. was ever given any express authority by the plaintiff to enter into an agreement prohibited by the statutes of the State of Washington whereby the plaintiff would charge and the defendant would pay less than the legal premium for the bonds involved." (R. 84, 86)

9. The District Court erred by its order denying Appellant's motion for judgment notwithstanding the verdict or for new trial upon the ground

> "That no evidence before the jury tended to show that either J. C. Beeson or McCollister & Company, Inc., was ever given any apparent authority by the plaintiff to enter into an agreement prohibited by the statutes of the State of Washington whereby the plaintiff would charge and the defendant would pay less than the legal premium for the bonds involved." (R. 84, 86)

10. The District Court erred by its order denying Appellant's motion for judgment notwithstanding the verdict or for new trial upon the ground

> "That all of the evidence before the jury established that United States Fidelity and Guaranty Company gave no authority express or apparent to J. C. Beeson or McCollister & Company, Inc., to enter into any contract giving defendant any premium rate other than that established by law." (R. 84, 86)

11. The District Court erred by its order denying

Appellant's motion for judgment notwithstanding the verdict or for new trial upon the ground

> "That all of the evidence before the jury established the existence in law and fact of an 'account stated' upon which plaintiff is entitled to recover." (R. 84, 86)

ARGUMENT

Rebate ~~Argument~~ Agreement Void

The Appellant contends that the oral promise of its agent to allow Appellee a reduction in premium by calculating the amount not according to the existing effective rates as filed and approved pursuant to statute, but according to anticipated inapplicable rates neither filed nor approved, constituted under the Washington Insurance Code an illegal agreement—a rebate—unenforceable and void.

The Appellant so contended in the District Court. (R. 29-33; 59-63) Based on Specification of Errors No. 1, No. 2, No. 3, No. 4, No. 5, No. 6 and No. 7, the Appellant continues so to contend.

The District Court rightly instructed the jury "that the (Appellant) in its business as a surety and in executing said bonds was and is subject to the Insurance Code of the State of Washington as then in force." (R. 343) That Code (being Chapter 79, Session Laws 1947) contained provisions as follows:

> "SEC. .19.04 Filing Required:
>
> 1. Every insurer shall, before using, file with the Commissioner every manual of classifications, manual of rules and rates, and every rating plan as to surety insurances, and every rating schedule, minimum rate, class rate, and rating rule as to

other insurances, and every modification of any of the foregoing which it proposes."

"2. Every such filing shall state its proposed effective date and shall indicate the character and extent of the coverage contemplated."

"3. Where a filing is required no insurer shall make or issue an insurance contract or policy except in accordance with its filing then in effect, except as is provided by section .19.09."

"SEC. .19. 05 Filings by Bureau:

1. If so authorized by an insurer, the Commissioner shall accept, in lieu of filings by the insurer, filings on its behalf made by a rating organization then licensed as provided in this article."

"SEC. .19.28 Deviations: 1. Every subscriber to a rating organization shall adhere to the filings made on its behalf by such organization, and shall not deviate therefrom except as provided in this section."

"SEC. .30.14 Rebates: 1. Except to the extent provided for in an applicable filing with the Commissioner then in effect, no insurer, general agent, agent, broker or solicitor shall, as an inducement to insurance, or after insurance has been effected, directly or indirectly, offer, promise, allow, give, set off, or pay to the insured or to any employee of the insured, any rebate, discount, abatement, or reduction of premium or any part thereof named in any insurance contract, or any commission thereon, or earnings, profits, dividends, or other benefit, or any other valuable consideration or inducement whatsoever which is not expressly provided for in the policy."

"SEC. .30.17 Receiving Rebate: 1. No insured

person shall receive or accept, directly or indirectly, any rebate of premium or part thereof, or any favor, advantage, share in dividends, or other benefits, or any valuable consideration or inducement not specified or provided for in the policy, or any commission on any insurance policy to which he is not lawfully entitled as a licensed agent, broker, or solicitor."

The pre-trial order of the District Court recited among other "admitted facts" (R. 56) that calculated according to the Appellant's premium rates as filed with the Insurance Commissioner for effect after April 1951 with respect to bonds within the classification of the bonds involved in this action, the sum of $47,753.72 was the correct amount of premium. (R. 58; Ex. 11—copy, R. 36) The pre-trial order also recited among such "admitted facts" that if figured according to the Appellant's reduced premium rates as similarly filed on the 5th of July 1955 for effect after the 20th of July 1955, the sum of $35,576.79 would be the correct amount of the premium. (R. 58; Ex. 12—copy, R. 37)

Appellant's reduced premium rates not being effective until after the 20th of July 1955 were not applicable to any element of the transaction. The Appellee's bid bond was dated the 18th of May 1955. (Ex. A-3) The written application signed by the Appellee containing its promise to pay premium for the performance and payment bonds was dated the 3rd of June 1955. (Ex. 1; copy attached to complaint, R. 12) The performance and payment bonds signed by the Appellee as principal and the Appellant as surety were dated the 31st of May 1955. (Ex. 2; Ex. 3; copies attached to

complaint, R. 13-17) Both these bonds fully executed were transmitted to the United States Engineers in behalf of Appellee by letter dated the 13th of June 1955. (R. 151; Ex. 8) Both these bonds as recited by the pre-trial order among "admitted facts" were "received by and/or for the obligee, United States of America, on or before the 17th of June 1955." (R. 57) In acceptance of such bonds notification to the Appellee and the other members of its joint venture to proceed with the performance of their construction contract was issued on the 17th of June 1955. (R. 58)

Clearly, the record contains no possible basis for any claim by the Appellee that Appellant's reduced premium rates filed on the 5th of July 1955 to take effect after the 20th of that month were operative in time to entitle the Appellee as a matter of law to the reduction sought. For this reason the Appellee has resisted the Appellant's action to collect the full amount of the legal premium only by relying upon the oral promise of its agent to allow an illegal reduction. In urging this lone defense, the Appellee is asking the court to aid it in violating Sec. .30.17 of the Insurance Code which prohibits the Appellee from receiving or accepting, "directly or indirectly, any rebate of premium."

On the factual issue the jury found that the Appellant's agent did promise to allow Appellee the benefit of future lower premium rates. On the remaining legal issue, this appeal presents the question whether such a promise is enforceable in the face of the statutory prohibition directed not only against the Appellant but *also against the Appellee* as well.

The general rule in point declares that an agreement violating a valid express statute is usually void. The general rule was recognized by Chief Justice Marshall more than a century ago when his opinion said:

> "Questions upon illegal contracts have arisen very often, both in England and in this country; and no principle is better settled than that no action can be maintained on a contract, the consideration of which is either wicked in itself, or prohibited by law."
>
> *Armstrong v. Toler,* 11 Wheat. (US) 258, 271; 6 L.Ed. 468, 472.

> "It is a general rule that an agreement which violates a provision of a Constitution or of a constitutional statute or which cannot be performed without violation of such a provision is illegal and void. In this respect there is no distinction between statutes and ordinances. This is the general rule whether the consideration to be performed or the act to be done is unlawful. Thus, a promise made in consideration of an act which is forbidden by the United States Constitution is illegal. An agreement in violation of a law is illegal whatever may have been theretofore decided by the courts to have been the public policy of the country on the subject."
>
> 12 Am. Juris. P. 652, Sec. 158.

> "An agreement directly and explicitly prohibited by a constitutional statute in unmistakable language is ordinarily void and no recovery can be had thereon. When a contract, express or implied, is tainted with the vice of violation of law as to the consideration of the thing to be done, no alleged right founded upon it can be enforced in a court of justice."
>
> 12 Am. Juris. P. 655, Sec. 160.

However, since the decision of the United States Supreme Court in *Erie Railroad Co. v. Tompkins,* 304 U.S. 64, 82 L.Ed. 1188, the general rule is to be applied on this appeal in harmony with the law of the State of Washington—hence, discussion of cases decided in that jurisdiction.

The earlier opinions of the Washington Supreme Court adopted the general rule.

A conditional sale vendor who sold furniture and furnishings to prostitutes for use in their house of prostitution was denied recovery of possession because the operation of their business was a statutory crime. The court's opinion said:

> "No principle of law is better settled than that a contract prohibited by law or morality is void as against public policy."
>
> *Standard Furniture Co. v. Van Alstine,* 22 Wash. 670, 677; 62 Pac. 145.

Upon an action to recover money paid for medical treatments to which the plaintiff refused to submit because the defendant was an unlicensed physician practicing in violation of statute, Judge Rudkin's opinion said:

> "Stripped of all subterfuges and pretenses, this is neither more nor less than a contract on the part of appellant Lawson to render professional services for the respondent, a contract he could not perform without violating the laws of the state. The contract was therefore against public policy, and is utterly void."
>
> *Deaton v. Lawson,* 40 Wash. 486, 490; 82 Pac. 879.

In passing, it is noteworthy that this ruling with quotation of Judge Rudkin's language was approved very much later by the Washington Supreme Court in *State ex rel. Standard Optical Co. v. Superior Court,* 17 Wn.(2d) 329; 135 P.(2d) 839; and in *State v. Boren,* 36 Wn.(2d) 522, 527; 219 P.(2d) 566.

In another early case, a woman afflicted with tuberculosis was denied damages for breach of promise to marry because performance of the contract would have violated the Washington statute making it the duty of all persons to avoid spreading the disease. Refusing relief the Supreme Court said:

> "It is a fundamental proposition that a contract contravening the provisions or policy of a public law is void or voidable. Macintosh v. Renton, 2 Wash. Ter. 121."
>
> *Grover v. Zook,* 44 Wash. 489, 501; 87 Pac. 638.

Defense against action upon a promissory note purchased after maturity was held to be good upon the ground that the consideration for the note was a loan by a brewery in violation of a Washington liquor statute. In so ruling, the court said:

> "The court listens to this defense not because of any desire to aid the maker of the note—indeed he is usually as culpable as the payee—but listens to it because of the public policy involved; because the parties in entering into the contract have violated the statute. A court will not knowingly aid in the furtherance of an illegal transaction."
>
> *Lewer v. Cornelius,* 72 Wash. 124, 129; 129 Pac. 911.

With subscription for stock in the defendant corporation, the plaintiff received the corporation's $1,000.00 bond promising to pay thereon if stock dividends were not declared and paid up to that amount within a limited time. The bond was held to be void, the Supreme Court saying:

> "It being established in this case that there were no profits out of which this dividend could be declared, it follows that, if the bond be enforced against the corporation, payment must be made out of its capital, which the law will not permit, upon the ground that any contract whereby a corporation seeks to diminish its capital stock, except in some way permissible by statute, contravenes public policy and is unenforceable."
>
> *Jorguson v. Apex Gold Mines Co.,* 74 Wash. 243, 244; 133 Pac. 465.

A subscriber to corporate stock sued upon a contract wherein the corporation promised to repurchase the stock at the price paid by him if he became dissatisfied as an employee. In denying recovery, the Supreme Court said:

> "We have discussed this case upon general lines, not because we have doubted the application of the statute, but because of the fact that many of the American courts have been disposed to write an exception into the statute in favor of contracting parties where the rights of present creditors are not involved. We have endeavored to show that the contract is contrary to public policy as well as violative of the letter and spirit of the statute law."
>
> *Kom v. Cody Detective Agency,* 76 Wash. 540, 547; 136 Pac. 1155.

An action to recover expenses incurred pursuant to

agreement for the promotion of an election to recall an elected public official in violation of a Washington statute was dismissed, the opinion saying:

> "Where a plaintiff, to make a case, must rely upon the illegal contract itself, he cannot recover."
>
> *Stirtan v. Blethen,* 79 Wash. 10, 16; 139 Pac. 618.

The Washington Supreme Court recognized the general rule by a quotation from the United States Supreme Court as follows:

> "The general rule of law is, that a contract made in violation of the statute is void; and that when a plaintiff cannot establish his cause of action without relying upon an illegal contract, he cannot recover."
>
> *Ferguson-Hendrix Co. v. Fidelity & Dep. Co.,* 79 Wash. 528, 533; 140 Pac. 700.

In an action by a female to recover wages as fixed by the Washington minimum wage statute, it appeared that she had signed an agreement to compromise her claim under which she still had not received the prescribed minimum. Although the statute in terms did not make the compromise void, it was held to be unenforceable in an opinion saying:

> "The statute being thus protective of the public as well as of the wage earner, it must follow that any contract of settlement of a controversy arising out of a failure to pay the fixed minimum wage in which the state did not participate is voidable, if not void."
>
> *Larsen v. Rice,* 100 Wash. 642, 650; 171 Pac. 1037.

A dairy company required its workers to sign an agreement that if they quit their jobs without giving advance notice of two weeks their wages would not become payable for thirty days. The Washington statute required wages to be paid "forthwith." In this case, Washington Supreme Court said:

> "It is clear that the statute establishes a rule of public policy, and that the natural right of the employer and the employee to contract between themselves must yield to what the legislature has established as the law. To hold otherwise would put it within the power of every corporation employing labor, by exacting a contract before employing, to set at naught the plain provisions of the statute."
>
> *Burdette v. Broadview Dairy Co.,* 123 Wash. 158, 163; 212 Pac. 181.

An unlicensed architect was disallowed recovery of fees under contract for his services rendered in violation of statute. After a rehearing by the Washington Supreme Court, *enbanc,* it stated:

> "This act does not in express terms make the mere rendering of architectural service by one not holding a license certificate unlawful, nor does it in express terms make a contract for such services by one not holding a license certificate unlawful and unenforceable; but the language of the act manifestly expresses the legislative intent that it shall be unlawful for one not holding a license certificate to assume the professional title of architect and as such enter into a contract to render architectural services. Now that is just what Travis did with reference to the construction of this building. He not only held himself out to Wise and wife

as being an architect possessing architectural skill and learning, prior to the making of his contract of services with them, but he prepared plans and specifications in such detail as is usual for the construction of buildings of the dimension and cost of the one in question. The several sheets of the drawings of the proposed building, of which the specifications were a part, were signed by Travis as architect. In the text of 13 C.J. 423, we read:

" 'Where a license or certificate is required by statute as a requisite for one practicing a particular profession, an agreement of a professional character without such license or certificate is ordinarily held illegal and void. This is true, for example, of an agreement made by an unlicensed or uncertificated physician, an attorney at law, a conveyancer, an engineer, or a school-teacher. The authorities are in accord on this point, where the license is required for public protection and to prevent improper persons from acting in a particular capacity and not for revenue purposes only.'

"Numerous decisions of the courts are there cited in the footnote lending unqualified support to this view of the law. In Wedgewood v. Jorgens, 190 Mich. 620, 157 N.W. 360, the court quotes the above text from 9 Cyc. 478, now found in 13 C.J. 423, in support of its holding that an unlicensed architect, the law requiring him to be licensed, cannot recover for architectural services performed by him because his want of license renders the contract illegal and unenforcible. Our own decisions in Kimball v. School District No. 122, 23 Wash. 520, 63 Pac. 213, and Deaton v. Lawson, 40 Wash. 486, 82 Pac. 879, 111 Am. St. 922, 2 L.R.A.

(N.S.) 392, involving claims of recovery sought by an unlicensed public school teacher and an unlicensed physician, are in harmony with this view of the law. In 30 A.L.R. 834 is an exhaustive note wherein may be found overwhelming support of the view of the law announced in the above quotation from Corpus Juris and our decisions in the Kimball and Deaton cases above noted. We think there is no escape from the conclusion that the contract for architectural services between Travis and Wise and wife, upon which Sherwood seeks recovery, was illegal and void and wholly unenforcible, leaving Travis and Sherwood, his assignee, without legal right of recovery thereon."

Sherwood v. Wise, 132 Wash. 295, 300; 232 Pac. 309.

Sound Ferry Lines, an intrastate water carrier, filed its tariff rates as required by law. Later it made special contracts with a bus company to transport passengers at lesser rates for which no tariff had been filed. The Washington statute prohibited the water carrier from charging or accepting either more or less than rates fixed by its tariff as filed. The Supreme Court held these special contracts unenforceable.

"It seems to us that the entering into and acting under these special contracts was in plain violation of the provisions of our public service statutes, above quoted. The rates so especially agreed upon were manifestly not intended as regular rates applicable to all stages, and were manifestly discriminatory in favor of the Wolverton Company."

Wolverton Auto Bus Co. v. Robinson, 151 Wash. 67, 76; 274 Pac. 1056.

A contract for conveyance of land on which pay-

ments had been made was declared void because the vendee was an alien who could not own real property under the Washington Constitution. Dealing with the matter, the Supreme Court said:

> "When it developed that the contract was illegal, the court would not, of course, enforce it. But it will lend its aid to the relief of the parties from the situation in which they have inadvertently placed themselves. It will free the land involved from the apparent lien of the contract; it will relieve the parties from any obligation under the contract; and will measure out to them such further relief as the facts justify."
>
> *Baker v. Knight,* 160 Wash. 500, 504; 295 Pac. 174.

Under a contract for commission a realtor, before issuance of his license as required by law, performed services in negotiating a sub-lease. By the terms of his contract commission was payable out of the rental for the first month under the sub-lease. Before the rental was due the realtor's license was issued. The Supreme Court held the contract for commission unenforceable, saying:

> "Appellant's agreement to perform, and its performance of, the alleged service, was illegal. When a plaintiff, to make a case, must rely upon an illegal contract or upon the performance of an illegal act, he cannot recover. Deaton v. Lawson, 40 Wash. 486, 82 Pac. 879, 2 L.R.A. (N.S.) 392, 111 Am. St. 922; Stirtan v. Blethen, 79 Wash. 10, 139 Pac. 618, 51 L.R.A. (N.S.) 623; Moser v. Pantages, 96 Wash. 65, 164 Pac. 768.
>
> "If appellant's contention were sustained, then

the obvious purpose of the statute could be easily and entirely circumvented."

Irons Investment Co. v. Richardson, 184 Wash. 118, 126; 50 P.(2d) 42.

In a suit by the State as owner of public land to recover certain royalties, on contract specifying the rates for calculating such royalties as required by statute, the defense was based upon full payment of lower royalties later adopted in the so-called "agreement of 1934" which disregarded the statutory rates. The defense failed.

"First, as to proposition (1), it is the general rule that a contract which is contrary to the terms and policy of an express legislative enactment, is illegal and unenforcible. 6 Williston on Contracts 5021, Sec. 1768; see 2 Restatement of the Law, Contracts, Sec. 580." * * * "It follows, from what we have said, that the promise of 'agreement' of 1934 was not authorized by our statutes then in force, and was indeed contrary to the policy of those legislative enactments, and, hence, was illegal."

State v. Northwest Magnesite Co., 28 Wn.(2d) 1, 26, 27; 182 P.(2d) 643.

Contracts attempting to avoid a statute enacted to protect the public against losses in the purchase of promotion mining stock were held unenforceable in an opinion saying:

"It is a general rule that where the contract grows immediately out of, and is connected with, an illegal act, a court of justice will not lend its aid to enforce it. Armstrong v. Toler, 24 U.S. 115, 6 L.Ed. 468, 11 Wheat. 258. Where a plaintiff, to make a case, must rely upon the illegal contract itself, he

> cannot recover. The law will aid neither party to an illegal agreement, but will leave the parties where it finds them. Reed v. Johnson, 27 Wash. 42, 67 Pac. 381, 57 L.R.A. 404. A contract which is contrary to the terms and policy of an express legislative enactment is illegal and unenforcible."
>
> *Hederman v. George,* 35 Wn.(2d) 357, 361; 212 P.(2d) 841.

As already noted, by a rather recent opinion enjoining the unlicensed practice of dentistry, the Washington Supreme Court repeated with approval the much older comment of Judge Rudkin in *Deaton v. Lawson,* 40 Wash. 486, 490 when he said:

> "Stripped of all subterfuges and pretenses, this is neither more nor less than a contract on the part of appellant Lawson to render professional services for the respondent. a contract he could not perform without violating the laws of the state. The contract was therefore against public policy, and is utterly void."
>
> *State v. Boren,* 36 Wn.(2d) 522, 527; 219 P. (2d) 566.

This chronological review of numerous cases decided over a stretch of many years by the Washington Supreme Court seems sufficient to show its long adherence to the general rule as briefly stated by Chief Justice Marshall in *Armstrong v. Toler,* 11 Wheat. (US) 258, 271; 6 L.Ed. 468, 472. Such being the situation, the Appellee must bear the burden of supporting its affirmative defense by demonstrating that the Washington Supreme Court by rulings involving the prohibition of the Insurance Code against premium rebates has departed from the general rule so definitely that

this court cannot enforce the general rule as the law applicable in the State of Washington.

In this effort, before the District Court, the Appellee's brief relied almost entirely upon a single ruling of the Washington Supreme Court which the Appellee characterized as "controlling"—the case of *Way v. Pacific Lumber & Timber Co.,* 74 Wash. 332; 133 Pac. 595. The Appellant disagrees. Although requiring explanation, the decision is not controlling upon this court.

As recited by the opinion in the *Way* case, the plaintiff and his partner Gould were in business as insurance agents. Through Gould the partnership caused certain insurance policies to be issued in favor of the defendant corporation at a rate of premium less than the "Board" rate. The agreed premium was paid. Thereafter Gould upon withdrawing from the partnership assigned all his interest to the plaintiff, who sued for the unpaid difference between the higher "Board" premium and the lower agreed premium. The court held that "the plaintiff cannot recover upon general grounds". (74 Wash. 333)

A careful reading of the opinion discloses that the real reason for denying recovery to the plaintiff was his failure to prove a contract or promise by the defendant to pay more than the amount already paid. The opinion said: "Plaintiff can only recover upon a contract, express or implied". (74 Wash. 333) In final conclusion the opinion said: "It follows, there being no contract or promise made by the defendant to pay a greater sum than has been paid, and none being im-

plied by statute, that the judgment should be affirmed". (74 Wash. 334)

This ruling by the Washington Supreme Court spotlights a vital difference between the facts involved in the *Way* case and the facts involved on this appeal. In this action the Appellee did contract and promise to pay the higher legal premium. The Appellee expressly so bound itself in its application for the bonds to be executed by the Appellant. This document (omitting language presently immaterial) provided: "Each of the undersigned * * * hereby agrees as follows: First, to pay or cause to be paid to the Company in advance a premium of $..... for the bid or proposal bond (the same to be credited on the premium for the performance bond if executed or procured by the Company, and a premium of $47,753.72 for the performance bond * * * " (Original, Ex. 1; copy attached to complaint as Ex. A; R. 6, 7, 8)

This obligation the Appellee admittedly signed. (R. 56) However, according to testimony which the jury apparently believed, the Appellee's signature was subscribed before the numerals specifying the amount of the premium were inserted in the blank on the printed application form. But despite such a circumstance—important in some instances, unimportant in this instance—the document still constituted an express contract or promise by Appellee, because it also provided: "Each of the undersigned * * * hereby agrees as follows: * * * Ninth, that the Company may fill up any blanks left, or correct any errors in filling up any blanks, herein * * * ". (Original, Ex. 1; copy attached to complaint as Ex. A; R. 6, 7, 11)

In other words, even assuming the Appellee signed the application in blank as to the premium figure, it authorized the Appellant to insert the same when calculated. Presumably the Appellee will urge the contention that the Appellant was not authorized to insert the sum of $47,753.72 (the legal premium, but was only authorized to insert the sum of $35,576.79 (the rebate premium). But such a contention is not available to it. Later the Appellee signed as principal its performance bond in favor of the United States—an obligation on the Government's "Standard Form 25. * * * prescribed by General Services Administration General Regulation No. 5." The instructions embodied therein stated: "There shall be no deviation from this form except as authorized by the General Services Administration". The form required a specification of the "total amount of premium charged". As signed by the President and certified by the Assistant Secretary of the Appellee this important item was stated to be $47,753.72. (Ex. 2; R. 57) The Appellee's performance bond with its payment bond were mailed to the United States Engineers for the Appellee by the manager of its joint venture with letter of transmittal dated the 13th of June 1955. (8x. 8; R. 151) Thus, to the United States the Appellee represented that its bond cost was $47,753.72. All these admitted facts force one necessary legal conclusion, namely, that the Appellee ratified the act of the Appellant when it inserted in Appellee's application for the bonds the premium figure of $47,753.72. Considering such facts, the Appellee should not be heard to say that it never contracted or promised to pay the legal premium.

Continuing discussion of the *Way* case, it differs markedly from this action for other considerations. There the only contract sued on had been completely performed by full payment; here the legal contract sued on has been but partly performed by installment payments. There the party plaintiff sought the aid of the court to avoid the rebate agreement; here the party defendant sought the aid of the court to enforce the rebate agreement.

Again the opinion of the Washington Supreme Court reflects the moving influence of another element present in the *Way* case but absent in this action. By its very brief comments, the opinion observed that in the old Insurance Code (Laws 1911, Chapter 49), Section 33 which prohibited rebates provided for the imposition of a severe penalty against "the property owner by reducing the insurance in such proportion as the amount of the rebate bears to the total premium." (74 Wash. 333) There the premium in dispute was consideration for insurance policies issued to protect the defendant as assured; here the premium in dispute was consideration for surety bonds issued to protect not the defendant but the United States as obligee. For patent reasons neither the former nor the present provisions of the Insurance Code outlawing premium rebates have attempted to impose a reduction of protection as a penalty applicable to surety bonds issued for the benefit of third parties.

In the *Way* case it is true the opinion contained a remark quoted by the Appellee in support of its defense, wherein Washington Supreme Court said:

"Plaintiff's error lies in the assumption that the contract between the co-partnership (the insurance agency) and the defendant (the insured) was void, whereas the rule is that a contract which violates a statutory regulation of business is not void unless made so by the terms of the act." (74 Wash. 333)

As already demonstrated that remark was merest dictum apart from the "general grounds" upon which the decision was explicitly based. However, that remark coupled with the admitted facts recited as surrounding the Appellant's cause of action, draws into sharp focus other provisions of the Insurance Code now effective (Laws 1947 Chapter 79) to-wit: Sec. .18.18 and Sec. .18.19 contained in Article 18 entitled on the general subject of "The Insurance Contract."

> "Sec. .18.18 *Stated Premium Must Include All Charges*: 1. The premium stated in the policy shall be inclusive of all fees, charges, premiums, or other consideration charged for the insurance or for the procurement thereof."
>
> "Sec. .18.19 *Must Contain Entire Contract*: No agreement in conflict with, modifying, or extending any contract of insurance shall be valid unless in writing and made a part of the policy."

As necessarily interpreted in the application of the Insurance Code to the surety business, the first of these sections plainly required that the correct amount of premium be stated in the bonds; and the second of these sections expressly declared that no modification of the amount of premium "shall be valid unless in writing and made a part" of the bonds.

Had these statutory provisions been in force and

under consideration when the *Way* case was decided, the Washington Supreme Court would hardly have indulged in the dictum quoted. Certainly the remark in its opinion would have been wholly inappropriate and inaccurate as to this action. Here the Appellant bases its recovery upon an express written contract composed of the application and the bonds all signed by the Appellee as inherent parts of a single transaction. In all three documents the legal premium is specified—by exact figures in the aplication and in the performance bond, and by clear reference to the performance bond, in the payment bond. (Ex. 3) Thus it appears that this written contract upon which Appellant sues has been positively declared valid in respect to the legal premium amount since such written contract has not been modified in the prescribed manner by written insertion of the rebate premium amount. Such being the situation, both in effect and in terms, the statute has pronounced the oral promise upon which Appellee rests its defense to be invalid and unenforceable—that is, void.

Thus, analysis of the *Way* case denies to it the rank of a "controlling" decision (as accorded by the Appellee) by revealing that except superficially it is not even "in point" on the facts in this action under the present Insurance Code of 1947.

The only other decision of the Washington Supreme Court involving insurance cited in Appellee's brief before the district court is the case of *Kidder v. Hartford Accident & Indemnity Co.,* 126 Wash. 478; 218 Pac. 220. This again is a ruling quite beside the point.

There a widow sued to recover on accident insurance for her husband's sudden death after he had signed with an insurance agent an application embodying the essentials on advice that coverage attached as of that moment, but before the insurance agent had either issued the policy or given notice of a classification change increasing the defendant's premuim of which the agent had himself been ignorant. Over dissenting views, a majority of the justices allowed a recovery against the underwriter on the basis of an oral contract of accident insurance which they held was permissible under the former Insurance Code of 1911. The opinion is without argumentative value to the Appellee except only as referring to the *Way* case. The ruling is without authoritative precedent for this court because it involved different parties, different facts, different issues, and different provisions of statute.

Search among the reported decisions of the Washington Supreme Court has failed to find any case in which on similar facts or similar issues it has expressed an authoritative opinion interpreting the pertinent provisions of the Insurance Code of 1947 applicable on this appeal. Therefore, Appellant's further attempt to aid this court is necessarily confined to brief comment about cases decided under the repealed Insurance Code of 1911.

The owner of a promissory note purchased in due course without notice before maturity sued the maker who defended upon the ground that the note was unenforceable because executed in connection with a prohibited rebate of insurance premium. Giving effect to

the negotiable instruments statute and recognizing the plaintiff as an "innocent holder" of commercial paper, the court allowed recovery. In doing so, the opinion said:

> "We will assume at the outstart that the note was invalid as between the original parties and subsequent holders with notice, by reason of the violation of the anti-rebate act."
>
> *Gray v. Boyle,* 55 Wash. 578, 579; 104 Pac. 828.

The plaintiff, being engaged both in loaning money on real estate mortgages and in writing policies of property insurance, sought to enjoin the Insurance Commissioner in his purpose of cancelling its license as an insurance agent because the plaintiff's form of application for mortgage loans authorized the plaintiff to place insurance on the property if the loan were effected. The court finding no premium rebate was actually involved held that the plaintiff was entitled to retain its license. The opinion said:

> "Respondent relies largely upon the holdings in the cases of Way v. Pacific Lumber & Timber Co., 74 Wash. 332, 133 Pac. 595, 49 L.R.A. (N.S.) 147, and Ferguson-Hendrix Co. v. Fidelity & Dep. Co., 79 Wash. 528, 140 Pac. 700. But in those cases we merely held, in accordance with fundamental principles of law, that one cannot avoid his contractual obligations because of his own violation of statutes regulating the conduct of the business under which the contract was made."
>
> *Calvin Phillips & Co. v. Fishback,* 84 Wash. 124, 128; 146 Pac. 181.

This limiting comment about the *Way* case, supra,

would seem to deprive it of support to the Appellee's affirmative defense in this action since the principle declared applies directly to the oral promise for rebate upon which Appellee relies.

The plaintiff, an agent for the New York Life Insurance Company, obtained for the defendant a mortgage loan on his property, it being agreed that the defendant would apply and pay for two policies of insurance on his life from which the plaintiff's commission as insurance agent would compensate him for services in obtaining the mortgage loan. In denying recovery because of the rebate, the court said:

> "The appellant further argues that, if the complaint discloses an agreement in violation of the section of the code above noted, even then he is not precluded from recovering, because the law does not declare such contract void. The statute does not, in terms, declare such contracts void, but Rem. Code, Section 6059-180, hereinbefore quoted, clearly prohibits such contracts, and Section 6059-191 provides that any insurance agent knowingly and willfully violating any of the provisions of this article shall be fined in any sum not exceeding five hundred dollars and shall have his license revoked.
>
> "The appellant relies upon the cases of Way v. Pacific Lumber & Timber Co., 74 Wash. 332, 133 Pac. 595, 49 L.R.A. (N.S.) 147, and Ferguson-Hendrix Co. v. Fidelity & Deposit Co., 79 Wash. 528, 140 Pac. 700. The Way case was a case where the appellant sought to recover the difference between the regular rate upon a policy of insurance and the reduced rate. We held in that case he could not recover, because, in substance, he could

not profit by his own wrong. We said in that case, however, that a contract which violates a statutory regulation of business is not void unless made so by the terms of the statute. We were there considering a contract which the agent was seeking to avoid for his own benefit. In the Ferguson-Hendrix case, we held to the same effect. In the latter case, quoting from Miller v. Ammon, 145 U.S. 421, we said:

" 'The general rule of law is, that a contract made in violation of the statute is void; and that when a plaintiff cannot establish his cause of action without relying upon an illegal contract, he cannot recover.

" 'We announced the same principle in the recent case of Stirtan v. Blethen, 79 Wash. 10 [139 Pac. 618, 51 L.R.A. (N.S.) 623].'

"The contract made here was in violation of the terms of the statute, and this action is an attempt on the part of the appellant to enforce, in his favor, an illegal contract which he made with the respondents. This he may not do."

Moser v. Pantages, 96 Wash. 65, 69, 70; 164 Pac. 768.

In an action between two insurance agents involving an agreement to divide their commissions between themselves, the court determined that no rebate was involved and concluded its opinion as follows:

"Rem. Rev. Stat., Section 7077, which prohibits a licensed insurance agent from making any rebate of the premium to the insured, is not applicable to the facts in this case. The purpose of that statute was to establish uniform insurance rates throughout the state and to maintain a standard

of such rates. Phillips & Co. v. Fishback, 84 Wash. 124, 146 Pac. 181.

"The case of Moser v. Pantages, 96 Wash. 65, 164 Pac. 768, in which it was held that a contract providing for a rebate or remission to the insured was void, has no application here, because, as already seen, there was no such rebate or remission contemplated in the contract now before us, and, in fact, none was made."

Wolfe v. Philippine Investment Co., 175 Wash. 165, 168; 27 P.(2d) 132.

Since the presently applicable provisions of the Insurance Code of 1947 in the State of Washington have not been the basis for any "controlling" decision by the Supreme Court in that jurisdiction (as already recognized by this court) it is presented with the problem of interpreting the Act as affecting the facts and issues on this appeal.

Jackson v. Flohr, 227 F.(2d) 607, 609, 610 (CA 9-1955).

In this connection, since the Appellee has grounded its affirmative defense so flatly on the *Way* case, supra, the attention of this court is directed to an opinion coming from the Court of Appeals for the Fourth Circuit, wherein it refused to be diverted from its own considered conclusion by a mere dictum from the local court.

"Nor should we surrender our own judgment as to what the local law is on account of dicta or other chance expressions of the judges of the local courts. The respectful attitude towards the local court, where there has been no decision on the precise question before us, is to consider that ques-

tion in the light of the common law of the state with a view of reaching the decision which reason dictates, and with the faith that the local court will reach the same decision when the question comes before it. To base a decision upon dicta, or upon speculation as to what the local court might decide in the light of dicta, would be to depart from our solemn duty in the premises and embark upon a vain and illusory enterprise."

New England Mutual Life Ins. Co. v. Mitchell, 118 F.(2d) 414, 420 (CA4-1941) Cert. denied 86 L.Ed. 505.

In another case where the rights of the parties depended upon an interpretation of state statute, the Court of Appeals for the Sixth Circuit said briefly:

"The statute does not denounce the payment of such premiums as fraudulent in law. It does not define the phrase 'in fraud of creditors.' The case of Lytle v. Baldinger, 84 Ohio St. 1, 95 N.E. 389, Ann.Cas.1912B, 894, is cited as the nearest approach to an interpretation of the statute by an Ohio court but neither the present issues nor the statute were involved in the Lytle case. Nothing said in the Lytle case can be construed as an interpretation of the language 'in fraud of creditors.'

"We are left therefore to our own view of the law * * * ".

Doethlaff v. Penn Mutual Life Ins. Co., 117 F.(2d) 582, 584 (CA6-1941). Cert. denied 85 L.Ed. 1536.

So in this similar situation now presented this court is left to its own view of the Washington law to be applied as a basis for reversing the District Court.

Unlawful Promise Unauthorized

Next, the Appellant contends that any oral promise by its agent to allow the Appellee a reduction, by calculating the premium for its bonds according to anticipatory rates then unfiled and unapproved, was neither expressly nor apparently authorized by the Appellant which was not bound thereby.

The Appellant so contended in the trial court (R. 84, 85) Based on Specification of Errors No. 1, No. 2, No. 5, No. 7, No. 8, No. 9, and No. 10, the Appellant continues so to contend.

In connection with this contention the Appellant has both admitted and asserted that McCollister & Co., Inc., was its general agent in Seattle, and that John C. Beeson, an officer of that corporation, was an attorney-in-fact empowered to solicit and sign the bonds involved. About these facts there is no dispute. The Appellee has never claimed that the oral promise of a rebate, upon which its sole defense is based, was ever made by anybody except John C. Beeson. (R. 39, 51, 63, 265, 292, 293) About this fact there should be no dispute.

Appellant's proposition has two elements: that of express authority and that of apparent authority.

As to the first element, the record contains no evidence tending to indicate that the Appellant ever by any means conferred either upon the agency corporation or upon Beeson any express authority to make the oral promise with which he has been charged.

As to the second element, the burden of proof lies with the Appellee. It has wholly failed to show that

Beeson had any apparent authority to make any such oral promise. From express power to solicit and sign bonds for the Appellant in a *lawful* manner does not arise implied power to do the same thing in an *unlawful* manner. From power to act for the Appellant legally does not flow power to act for it illegally. Beeson had no apparent authority to violate the law or commit a crime.

On this point Justice Story in writing for the United States Supreme Court was specific more than a century ago.

> "The first instruction asked was that there was no evidence in the cause to show that John K. West had any authority from the defendants in the cause, to effect a sale of any property belonging to the estate of their testatrix, in Louisiana, except in conformity with the laws of the said State; and that unless the plaintiff shows a sale to the plaintiff (Hull) by West, in conformity with the said laws, and a subsequent recovery from Hull, he is not entitled to recover. We are of opinion that this instruction ought to have been given as prayed.
>
> "Every authority given to an agent or attorney to transact business for his principal must, in the absence of any counter proofs, be construed to be, to transact it according to the laws of the place where it is to be done. A sale of slaves, authorized by an executrix to be made in Louisiana, must be presumed to be intended to be made in the manner required by the laws of that State to give it validity. And the purchaser, equally with the seller, is bound under such circumstances to know what these laws are, and to be governed thereby. The

law will never presume that parties intend to violate its precepts; * * * ''

Owings v. Hull, 34 Peters (US) 607; 9 L.Ed. 246, 253.

In an action to recover upon a guardianship bond written by an agent (without any statutory violation) whose apparent authority to bind the surety was disputed, the Washington Supreme Court by an opinion rendered earlier this year said:

''In any event, an agent cannot enlarge his actual authority by his own assertions or representations. In an action against the principal, such as the instant case, the only competent evidence of an agent's apparent authority is that which is founded on some act or representation of the alleged principal.''

Charette v. American Etc. Co., 49 Wn.(2d) 777, 780; 307 P.(2d) 252.

Upon this question of apparent authority the Washington Supreme Court decided another case involving a situation so similar that the opinion is quoted in full —the only noteworthy distinction being that there the principal on the contractor's bond knew he was dealing with the surety's local agent of authority limited by the principal while here the Appellee was bound to know that Beeson's authority was restricted by regulatory prohibitions of law. The court's opinion said:

''The plaintiff surety company seeks recovery of a balance claimed to be due it for premium upon a surety bond executed by it as surety for the defendant, Lind, to secure performance of a road construction contract entered into by him with the United States. A trial in the superior court

for Whatcom County, sitting with a jury, resulted in a verdict and a judgment rendered thereon denying any recovery to the surety company, from which it has appealed to this court.

"At the conclusion of the introduction of the evidence, counsel for the surety company timely moved the court to instruct the jury to render a verdict in its favor for the sum of $1,395 and interest; and, after the return of the verdict, timely moved the court to render a judgment in its favor for that amount notwithstanding the verdict. The conceded and uncontroverted facts, the latter appearing almost wholly from Lind's own testimony, controlling of the question of the surety company being entitled to such judgment as a matter of law, may be summarized as follows:

"In October, 1921, Lind tendered to the bureau of public roads of the agricultural department of the Unted States bids for the construction of a section of the so-called McKenzie River road in Oregon, and was by that bureau awarded a contract accordingly. The total contract price was $186,000. It was a condition of the specifications and the contract to be formally entered into, that Lind should furnish a bond with surety in a penal sum equal to one-half of the total contract price, securing the performance of the contract. The contract was accordingly formally entered into between Lind and the United States, he furnishing a bond as required, executed by himself as principal and the surety company as surety in the penal sum of $93,000. Lind was then a resident of Bellingham in Whatcom county, in this state. R. L. Kline was then the local agent at Bellingham of the surety company, but without authority to write or execute a bond of this nature for this amount. His

only authority was to take written applications for such bonds upon blank forms furnished by the company to be signed by the applicant and then forwarded to the general manager and resident vice president of the surety company at Seattle for acceptance or rejection by him, and the execution of the bond by him as surety for the company, if the application be accepted.

"Lind was well aware of this limited agency power on the part of Kline. He claims to have entered into an oral contract with Kline, the local agent, by which he was to pay premium to the company for its execution of the bond as surety, equal to one and one-half per cent of the amount of the bond; that, one and one-half per cent of $93,000, making $1,395; while the surety company claims that Kline did not have any authority to enter into any such contract and did not assume to enter into any such contract, but that Lind, by making application for and by accepting the bond, impliedly agreed to pay the uniform regularly established premium rate therefor, which was then one and one-half per cent upon the total price of the contract for the performance of which the bond was given to secure; that is, one and one-half per cent of $186,000, making $2,790; one-half of which, it is conceded, Lind has paid to the surety company.

"Lind testified in substance that, at the time of the signing of the application and delivering it to Kline, he, Kline, agreed that the premium to be paid this surety company for the execution of the bond would be one and one-half per cent upon the amount of the bond, that is, $1,395. It is further shown beyond question, and not disputed in any way, that the regularly established premium rate upon such a bond is one and one-half per cent

upon the total price of the contract for the performance of which the bond is given to secure. Lind also testified that, when he made application to Kline for the bond, he signed the application without any of the blank spaces being filled in, with the understanding that Kline would fill them in with the proper data, and that this was afterwards done either by Kline or by someone at the general agency in Seattle.

"The evidence is in serious conflict as to Kline assuming the making of a contract with Lind that the premium would be one and one-half per cent of the amount of the bond, and also as to the application being signed by Lind before the filling of the blanks therein. We, however, adopt Lind's version of these facts in view of the finding of the jury. The application upon its face shows an express promise of Lind to pay the premium upon the bond in the sum of $2,790, that being one and one-half per cent of the contract price. The application was by Kline forwarded to the general manager and resident vice president at Seattle; and, in compliance with the data and information appearing thereon, after the filling of the blanks, the bond was executed by the surety company as surety and by Lind as principal and delivered to the proper authorities of the United States, as provided by the construction contract theretofore signed. The body of the bond does not seem to show the amount of the premium charged by the surety company.

"A short time after the execution of the bond, the surety company presented to Lind a bill for the premium, claiming $2,790 due thereon. This, Lind insists, was the first intimation he had of the surety company claiming premium computed upon

the contract price instead of upon the amount of the bond. Thereafter Lind paid the surety company $1,395; and refusing to pay more, this action was commenced by the surety company, seeking recovery of the balance of $1,395 claimed by it to be due. It is not claimed that the general manager and resident vice president or anyone connected with the surety company, other than the local agent, Kline, had ever intimated to Lind that the premium would be at other than the uniform regularly established rate; nor that anyone connected with the surety company, other than Kline, had any knowledge of the attempted making of the claimed premium rate contract between Lind and Kline, until after the execution and delivery of the bond.

"In view of the very limited, apparent as well as actual, authority of Kline as agent of the surety company, it seems to us that it must be held, as a matter of law, that any attempted contract between Lind and Kline, as agent of the surety company, looking to the fixing of the amount of premium upon the bond at one-half of such uniform regularly established rate was wholly without binding force upon the surety company. There is not only the slightest affirmative showing of authority given by the surety company to Kline to make for it any such contract, but the legal presumptions are overwhelmingly against it. The provisions of our insurance code here applicable provide for the establishment of uniform regular premium rates and the filing of schedules thereof in the office of the state insurance commissioner, and also provide for penalties for the failure to observe such uniform rates in making charges for premiums. Sections 7076, 7077, 7118, 7147, Rem.

Comp. Stat. [P.C. Secs. 2939, 2940, 2980, 3009] The surety company complied with these provisions by duly filing its schedule of rates with the insurance commissioner, to be computed, as here claimed by it, upon bonds of this nature, as here shown by a duly certified copy of its schedule of rates so filed with the insurance commissioner.

"We are not here concerned with any claimed special premium rate contract entered into between Lind and the general manager and resident vice president of the surety company. Whether such a special contract rate with the general manager and resident vice president could be enforced by Lind as against the surety company, we need not here inquire. It is sufficient for present purposes for us to say that we are of the opinion that the attempted special premium rate contract between Lind and Kline, the local agent assuming to act for the company, was wholly without the agency authority of Kline, and that Lind must be held, as a matter of law, to have known that Kline had no authority to make any such a contract. It follows, as a matter of law, that the surety company is entitled to premium for the issuance of the bond computed at the established uniform regular rate of one and one-half per cent upon the total contract price, that is, $2,790, less the $1,395 already paid.

"The judgment of the superior court is reversed, and the cause remanded with directions to award to the surety company a judgment in the sum of $1,395, with interest, notwithstanding the verdict, in harmony with the conclusion we here reach."

American Surety Co. v. Lind, 132 Wash. 326; 232 Pac. 280.

The record in the present action is empty of evidence upon which reasonably to conclude that the Appellant itself either by knowledge or by act had clothed Beeson with the appearance of authority to promise the Appellee a premium rebate.

If for no other reason, the lower court should have directed a verdict in favor of the Appellant or have granted its motion to upset the judgment based thereon, merely because Beeson's oral promise was utterly unauthorized.

Account Stated

Finally, the Appellant contends that with some undisputed evidence and by the admissions of Appellee in the pretrial order, the record shows an "account stated" on which Appellant was entitled to a judgment of recovery.

The Appellant so contended in the trial court. (R. 63, 84) Based on Specification of Errors No. 1, No. 2, and No. 11, the Appellant continues so to contend.

Always consistent with the written contract composed of the signed application and the signed bonds which specified the sum of $47,753.72 as the premium, invoices for that amount were issued to the Appellant through the joint venture of which it was a member. No bills demanding payment were ever issued except for that same total amount or for balances due thereon after allowance of credits for part payment. (Ex. 4)

The bonds became fully effective as an obligation of both the Appellee and the Appellant when accepted by the United States Engineers on the 17th of June 1955.

(R. 57, 58) Monthly thereafter Appellant's bills were sent in July, August, September, October, November and December of 1955. Partial payments were made in September and October of 1955. Each was *exactly* 25% of the total. Hence, half of the total was paid without protest. The pretrial order as "admitted facts" recited:

> "That statements of account in the amount of $47,753.72 were submitted to Islands Construction Co. as manager of the joint venture on account of the premium charged under dates of July 1, 1955, August 1, 1955, September 1, 1955, October 1, 1955, November 1, 1955, and December 1, 1955. That the joint venture without protest paid on said account under date of September 19, 1955, the sum of $11,938.43 and a like sum was similarly paid on account under date of October 21, 1955 which payments were properly credited." (R. 57, 58)

Despite some qualifying or contradicting testimony at the trial from witnesses for Appellee, it is bound by these formal deliberate pretrial admissions.

CONCLUSION

In preliminary paragraphs of the Insurance Code, the Washington Legislature declared as follows:

> "Sec. .01.02 Scope of Code: All insurance and insurance transactions in this state, or affecting subjects located wholly or in part or to be performed within this state, and all persons having to do therewith are governed by this code."
>
> "Sec. .01.03 Public Interest: The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and

equity in all insurance matters. Upon the insurer, the insured, and their representatives rests the duty of preserving inviolate the integrity of insurance." (Laws 1947, Chapter 79)

The Washington Legislature in the same enactment by Sec. .30.17 pointedly directed a prohibition against the Appellee by providing that: *"No insured person shall receive or accept, directly or indirectly, any rebate of premium or part thereof."*

In this litigation the Appellee by urging its sole defense is asking affirmative aid of the courts to violate the express letter and the worthy purpose of the insurance law in the State of Washington. For this reason the Appellant has more than a selfish interest in this court's reversal of the District Court's judgment.

Respectfully submitted,

LANE SUMMERS
THEODORE A. LEGROS
Attorneys for Appellant.

APPENDIX — EXHIBITS

Rule 18-2(f)

Exhibit Number	*Identified*	*Offered*	*Received*
1.	R105	R107	R218
2.	R109	R109	R109
3.	R110	R111	R111
4.	R124	R123, 125, 126	R126
5.	R137	R137	R137
6.	R139	R139	R139
7.*	R146	R147	*
	R148	R149	R149
8.	R150	R151	R151
9.	R154	R288	R288
10.	R169	R169	R169
11.	R178	R178	R179
12.	R184	R184	R184
13.	R224	R224	R224
14.**	R254	R254	R254
15.	R320	R323	R324
A-1	R129	R130	R130
A-2	R239	R245	R245
A-3	R244	R244	R244
A-4	R261	R262	R262

*Typewritten copies substituted for photostats (R148)

**Withdrawn from record by stipulation of counsel.